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No. 91-471

IN THE
Supreme Court Of The United States

October Term, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents

**SUPPLEMENTAL BRIEF FOR THE RESPONDENT
GUY HUNT IN REPLY TO THE AMICUS CURIAE BRIEF
OF THE UNITED STATES**

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The Solicitor General is Appearing For a Client Agency.

The January 7 brief of the Solicitor General is **not** filed as a disinterested exposition on behalf of the greater, unrepresented public interest. It is clearly a statement of the parochial position of the Environmental Protection Agency.¹ As a result of Superfund cleanups, EPA is tradi-

¹Attached as an Appendix is a well balanced magazine article entitled, "The Hazardous Waste War", *Governing*, November, 1991. This provides an independent factual account of the problem.

tionally the largest customer or supplier of the hazardous waste landfill facility at Emelle, Alabama. EPA issued the hazardous waste permit for the Emelle facility and has since assisted the petitioner in making Emelle the world's largest hazardous waste commercial landfill. Toxic and deadly substances are being buried there in quantities never before assembled in one location.

Alabama's Legitimate and Well-Founded Concerns are Admitted.

The Solicitor General admits that the State of Alabama "plainly has legitimate and well-founded concerns" involving the "health, safety and welfare of its citizens", and that, as a consequence, "enjoys a large measure of legislative and regulatory authority over the Emelle facility under its traditional police powers." Brief for the United States as Amicus Curiae at 8 ("Brief"). Nevertheless, the Solicitor General contends the additional fee on out-of-state hazardous waste is not "necessary or appropriate." Brief at 9. He suggests Alabama's only remedy is to present those concerns to Congress. Brief at 11. Two points are submitted in reply.

The first is that the proposed remedy through Congressional action is illusory. Congress has done nothing. Should the decision of the Alabama Supreme Court be set aside, in all probability Congress will continue to do nothing. The votes are simply not there, due to the "NIMBY" syndrome existing in practically every one of the great majority of states which do not have a permitted hazardous waste commercial landfill.² The only way

²See the quoted comments of Linda W. Little, Executive Director of North Carolina's Waste Management Board that appear in the Appendix, *Governing*, supra, at A-7-A-8.

to obtain Congressional action is to have the non-complying states realize that differential fees as recommended by the National Governors' Association are a reality.

The second point in reply is that Congressional action is *not* necessary to approve differential fees. The admittedly legitimate "safety, health and welfare" concerns of Alabama for its citizens distinguish this hazardous waste problem from both the factual and legal contexts of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).³ As the Solicitor General's brief notes, the Supreme Court of Alabama determined in this case that *City of Philadelphia* is "inapplicable in the context of hazardous waste disposal." Brief at 7.

The "Base Fee" and "Cap provision" are NOT Appropriate Issues for Review or Remand.

With respect to issues 2 (the "Base Fee") and 3 (the "Cap Provision"), the petitioner did **not** meet its burden of proof in establishing that under the evidence presented, any constitutional infirmity exists. In effect, the Solicitor General so concedes by arguing that a remand would be necessary on these issues. Further, the legislative findings and the extensive findings of fact by both courts below reflect that Act 90-326 goes well beyond the mere raising of revenue for the State of Alabama. The balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is clearly the appropriate legal standard for review of such statutes.

³Inexplicably, the Solicitor General mentioned only "the greater environmental risks associated with hazardous waste" in asserting that *City of Philadelphia* is controlling. Brief at 12-13. No mention was made at that point in the Solicitor General's brief of the admittedly legitimate "safety, health and welfare" concerns. The omission is particularly significant in that cancer or other disease-caused deaths stemming from hazardous waste contamination cannot be later "reimbursed".

Summary Disposition is Inappropriate.

What is perhaps most objectionable is the Solicitor General's suggestion that this Court "may wish to consider summary reversal" of the differential or additional fee issue. Brief at 20. How can that be appropriate after (1) he admits that the State of Alabama has "legitimate concerns" for the "health, safety and welfare" of its citizens, (2) he admits that the issue here is a significant one,⁴ and (3) considering that his major authority is *City of Philadelphia*, a 14 year old divided decision of this Court concerning only solid waste (or garbage) in which, unlike the record in this case, there were no valid reasons for treating out of state waste differently?

Should this Court decide to grant the petition, a full review would be in order rather than a summary disposition. Not even the petitioner suggested otherwise. Perhaps the most serious deficiency resulting from the drastic curtailment inherent in a summary disposition would be the deprivation of the opportunity for other states and interested groups to submit briefs as amicus curiae, even though the Solicitor General was invited to do so.

⁴The full quote is, "More broadly, however, the struggle between petitioner and the State of Alabama does not stand alone on the legal landscape. Disposal of waste — whether solid, hazardous, or nuclear — has become an extremely controversial and divisive issue across the Nation". Brief at 7. Also, see the attached Appendix.

CONCLUSION

In any event, the unanimous decision of the Supreme Court of Alabama is well supported by this fact intensive record and by *Maine v. Taylor*, 477 U.S. 131 (1986). The petition should be denied.

January, 1992

Respectfully submitted,

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APPENDIX

A-1

GOVERNING,
The Magazine of States and Localities
November 1991

THE POISONOUS WAR
OVER HAZARDOUS WASTE

By Jonathan Walters

As with most siblings, North and South Carolina have had their rivalries, some dating back to when the colony of Carolina was carved in two in 1710. But it was a problem with a modern flavor—the disposal of hazardous waste—that made South Carolina Governor Carroll Campbell's blood boil.

He was furious about a state-by-state "environmental report card" released last summer by a major environmental consulting firm. It ranked the Palmetto State in the relatively dirty bottom 25 and put the Tar Heel State in the cleaner-and-greener top 25. Unfair, insisted Campbell. The reason for the disparity, he said, was that South Carolina had become the dumping ground for North Carolina's hazardous waste. Campbell went so far as to travel to Washington to see if he could persuade officials at EPA to pull some of North Carolina's Superfund money.

"North Carolina is a neighbor and a sister state," says Tucker A. Askew, Campbell's press chief. "The governors of the two states are friends, and yet we remain in pitched battle over North Carolina's intransigence and unwillingness to honor its own commitments to site facilities."

Indeed, the hazardous waste dumping issue has made for bad blood among a lot of states. Arizona, Idaho, Nevada, and Utah are all displeased with California for shipping millions of tons of hazardous waste to them. Ohio is unhappy with New Jersey, among others. Alabama has had it with nearly two dozen states, from Massachusetts to Mississippi.

Fueling this modern war between the states is the roughly 240 million metric tons of industrial solvents, dioxin, pesticides, acids, herbicides, PCBs, heavy metals and hundreds of

other toxic materials produced each year by farming, manufacturing and a wide variety of service industries. Disposal of the waste is the diciest, most divisive political issue to hit states and localities in decades.

The flash points are easy to spot: States that have traditionally acted as receptacles for other states' hazardous waste—Alabama, Louisiana, Ohio and South Carolina, among the leaders—are fed up and are starting to do everything in their power not to take it anymore, or at least not as much of it.

At some point last winter, Alabama officials believe Louisiana took over from Alabama the undesirable distinction of being the number one recipient of out-of-state hazardous waste. Louisiana's leap into the lead was no accident, however. It was the direct result of a policy adopted by Alabama to reduce the amount of hazardous waste flowing in.

Alabama has become much more militant in rejecting its traditional role as hazardous waste dump to the Southeast and the nation. Toward that end, the Alabama legislature in the summer of 1989 passed a tough two-tiered tipping tax on hazardous waste being dumped within its borders. Waste generated in-state would be taxed at \$40 a ton; out-of-state waste would be taxed at a whopping \$112 a ton.

The effect was immediate and profound. The flow of material into Chemical Waste Inc.'s Emelle, Alabama, hazardous waste site, the largest such dump in the country, quickly eased. The facility, which had handled more than 800,000 tons of hazardous waste the year before, received less than half that amount the following year.

Alabama officials are also pleased with the fiscal result—the \$30 million-plus from the tax that has so far poured into the state's general fund. Chemical Waste Inc. isn't so pleased; the company took the state to court over the tax. The Alabama Supreme Court ruled in the state's favor, but the company has appealed the case to the U.S. Supreme Court, charging that the tax violates the Commerce Clause of the U.S. Constitution, which the industry interprets as guaranteeing the unfettered flow of tainted trash as though it were a commod-

ity like any other—cars, food or television sets.

For the time being, however, the tax is accomplishing its main purpose: reducing the amount of hazardous waste coming into Alabama. "Nobody," says Ron Farley, associate general counsel with the Alabama Department of Environmental Management, "wants to be number one."

That goes for Louisiana, too, which disputes Alabama's assertion over its ranking and has passed taxes of its own on waste. Those taxes are also being challenged in court.

But ranking is really not the issue. The issue is which states are taking the nation's hazardous waste and which states are dishing it out. The issue is also whether those states that are handling more than their fair share are being adequately compensated for their trouble.

As of 1987, 15 states were net importers of hazardous waste and 35 were net exporters, according to the most recent data submitted to the U.S. Environmental Protection Agency under the federal capacity assurance plan program, which requires each state to assure EPA that it has a plan for handling its future hazardous waste disposal needs. There is no real geographic pattern to which states are importers and exporters, with the exception of the New England states, all of which are net exporters. (*See map, page 35.*)

Who imports and who exports was set (in stone, say some exporters) with the 1984 reauthorization of the federal Resource Conservation and Recovery Act, which put in place stringent standards both for how various types of waste would be handled (burned or buried, for example) and for the permitting of hazardous waste facilities.

The net importers think the net exporters are taking advantage of the importers' natural resources, possible environmental future, legal position, patience and goodwill. The response of exporters is now rote recitation: We are trying, they say, but tough siting standards combined with local opposition make it virtually impossible to establish new facilities. In fact, only one new disposal facility has gone on line since the 1984 RCRA reauthorization; all of the other current facilities

are the same ones that were operating then; they were granted interim permits under the reauthorization.

The issue of siting hazardous waste facilities is a tough one. Most state and local politicians—not to mention the hazardous waste disposal industry—do not want to invite the bruising local political battles that are invariably involved. "And as long as they don't have to, they won't," says E. Dennis Muchnicki, senior environmental policy adviser with the Ohio attorney general's office, which has been in the thick of some of the federal court battles over interstate bans on hazardous waste.

Virtually all efforts by net importers aimed at curbing the inflow of waste these days are at the same time aimed at putting pressure on net exporters to site facilities within their own borders—to force those politicians in other states to face up to the tough political fights involved.

To apply that pressure, importing states are pursuing several avenues. For one thing, they want the right to ban hazardous waste imports from selected states. Targeted would be states that produce substantial amounts of hazardous waste but that have made no effort to establish facilities, as well as states that have adequate disposal facilities within their borders but ship some hazardous waste out anyway (California, for instance).

Net importers also want Congress to sanction a clear right to impose a tax or surcharge on out-of-state hazardous waste, both to compensate the residents of the host state for accepting the stuff and to provide funds for expensive cleanups that may be down the road. Importing states also want the right to investigate and even inspect the source of out-of-state hazardous waste if they feel it necessary. Improperly labeled hazardous waste shipped into Ohio in 1984 killed a man when it caused an incinerator to explode.

So far, net importers have been mostly thwarted in their efforts, however. Alabama and South Carolina have in the recent past banned the import of hazardous waste from certain states, and the bans have been struck down for violating

the Commerce Clause. In fact, it was after the U.S. 11th Circuit Court of Appeals struck down Alabama's ban on hazardous waste from 22 states that the Alabama legislature swung right around and passed its two-tiered tax.

Through state permitting procedures, New York state has closed all its commercial hazardous waste facilities to waste from states that refuse to enter into reciprocal agreements to take toxic waste from New York, a policy that the waste industry is considering challenging in court. Texas had instituted a temporary moratorium on siting facilities; it expired last month.

The net-exporter states frequently mentioned as the worst offenders mostly admit to their failings. "We're the bad boys," says Linda W. Little, executive director of North Carolina's Waste Management Board. She offers the exporter's standard defense: Governor James G. Martin has been working hard with industry on siting a facility, but he has been thwarted thus far by local opposition. Massachusetts, considered to be one of the worst of the bad actors, has in the last 10 years chosen a half-dozen sites for a hazardous waste facility; its Department of Environmental Quality has shot down each one.

"Most of the state regulators that I talk to from the exporter states acknowledge that we and the other importing states have a legitimate concern," says Alabama's Farley. "They say they would like to address the fairness issue. But 'when' and 'how' are good questions."

What happened with North Carolina is illustrative. When Alabama passed its interstate ban, it made it clear that states showing at least some inclination toward dealing with their own hazardous waste would be taken off the list of the Forbidden 22. North Carolina—prominent on that list—quickly swung into action to develop a siting plan. But after the 11th Circuit Court decision, the sense of urgency seemed to evaporate and the plans languished. "My impression is that when the 11th Circuit ruled against us, it took pressure off North Carolina to do anything," Farley says.

Net importers do not blame state and local officials solely, however. The hazardous waste disposal industry is not much interested in siting new facilities, some state officials charge. Why invite the public relations hassle of siting new facilities when you can make money off the ones you have open already? "Industry doesn't want new facilities," says Ohio's Muchnicki. "They have a vested interest in running the old facilities into the ground."

That, the industry responds, is garbage. The industry would be happy to fulfill its role if states would only fulfill theirs, says Bob Eisenbud, Waste Management Inc.'s government affairs director. He thinks politicians and bureaucrats in states not pulling their waste disposal weight need to be more aggressive in their pursuit of sites and more helpful in the processing of site permits. "We don't like this situation where states default on pledges [to site facilities]. After all, we stand to be ones who site the facilities."

Some officials hope that EPA, through its authority to withhold Superfund money, will scrutinize states' capacity assurance plans and pressure the worst of the exporters to get serious about siting facilities. But EPA has shown little enthusiasm so far for doing so.

Withholding Superfund money would not work anyway, believes Frank Coolick, administrator of hazardous waste regulation for New Jersey, which imports about as much hazardous waste as it exports. "The question in the bad states is how to get the politicians to act responsibly. Do you think governors or legislators are going to take the heat if a state's Superfund money gets yanked? Absolutely not. They'll blame Frank Coolick and the agency; they'll say we submitted a bad capacity assurance plan."

Only one state, Colorado, has sited a disposal facility since the 1984 RCRA reauthorization. The landfill in a small town called Last Chance opened last July. The process took 10 years and involved lawsuits filed both by the owner of the site, Browning-Ferris Industries (which has since sold it to a new company) and by opponents of the facility.

The only other facility even close to reality (a reality that is still years away, however) is an incinerator and landfill proposed for Lind, Washington. It is being developed by Environmental Control Services Corp., which was started by former EPA Administrator William D. Ruckelshaus, who now heads Browning-Ferris.

Instead of the old-style "jam-it-down-their-throats" route, which simply does not work these days, Ruckelshaus decided to make proposals to localities, inviting them to solicit the facility. Lind got the nod on the strength of its location in the arid eastern part of the state and a 67 percent positive response to a local referendum on the siting proposal. Industry and public officials are watching the experiment closely.

In response to the growing impatience and militancy of net importers, governors and state environmental protection officials are beginning to face the equity issue, sort of. In the name of "lowering the current temperature of debate," says Oregon's Fred Hansen, chairman of a committee of state environmental department heads looking into the issue, environmental officials and the National Governors' Association have been working on a proposal that would put pressure on net exporters to act.

NGA's new proposal, approved last August without vocal dissent, calls for a federal policy allowing selective state bans on hazardous waste (mostly on waste coming from states that have the capacity to handle it themselves), and for specifically allowing Alabama-style differential tipping taxes.

But the waste handling industry is not happy about the prospect of 50 sets of rules, regulations and tax tables covering waste disposal, and is not likely to sit still for Congress's sanctioning of bans and vastly variable tipping taxes.

The governors' idea, currently, is to push their proposal as part of the reauthorization of RCRA, which is more than three years overdue. But that plan's chances are considered slim. The monolith that NGA might have appeared to be last August will likely quickly come apart on Capitol Hill if NGA's proposal actually starts showing promise. North Carolina says

as much: "If we had hazardous waste facilities in place in North Carolina, we would endorse the governors' proposal 100 percent," says Linda Little. "But right now we would be in the peculiar position of endorsing something that might hurt us."

Ultimately, most believe that Congress will have to step in and somehow even the playing field, or at least force the bad-actor states to act better. Proposals include passing a federal tipping tax, collected on interstate hazardous waste shipments and distributed among the net importers. Other pressure tactics would include pushing the EPA to withhold funds from hazardous waste generating states that fail to take more responsibility for dealing with their own flows. Or Congress might eventually go along with the NGA proposal.

In the absence of federal action, the hazardous waste issue portends to get hotter. Net importers promise to continue the guerrilla tactics they have been adopting with increasing frequency: bans, taxes, tough permitting requirements or even outright permitting moratoria. "If any state wants to be creative in banning stuff from coming in, they can find ways to do it," says Oregon's Hansen. "It may not hold up in court, but it takes three years for it to get knocked down. They can disrupt the system."

That's the plan, says Robert W. King Jr., South Carolina's assistant deputy commissioner for environmental quality control. "This issue is not going to go away. People feel they're not being treated equitably, and they're not. We will continually strive to balance this situation. We're not going to stop."

GOOD ACTORS, BAD ACTORS AND THE FINE PRINT

As the map shows, 15 states are net importers of hazardous waste and 35 are net exporters. But on closer examination, that simple picture gets more complex.

The figures were provided to the U.S. Environmental Protection Agency by the states under EPA's capacity assurance plan program. The numbers are old, however, dating back to 1987, and the status of some states—Colorado and New Jersey, for example—may have reversed since then.

Even when they were fresh, the numbers were considered suspect in some quarters. Some importing states charge that some exporting states fudged the figures in order to make it look like they were handling more of their own waste than they actually were.

Furthermore, the map is only a very general guide to which states are and are not pulling their hazardous waste disposal weight. A large handful of the states listed as net exporters—Alaska, Nevada, South Dakota, Vermont and Wyoming, for example—neither produce nor export very much hazardous waste, and so should not be condemned for not dealing with their own waste problems, net importing states acknowledge. A handful of states, including California, Massachusetts, North Carolina and Pennsylvania, are considered woefully and deliberately negligent.

While some state officials consider the capacity assurance plan numbers suspect, numbers compiled independently by EPA confirm the patterns outlined by the map. Those numbers, too, are old, however, also dating back to 1987. According to EPA's indepen-

dently compiled statistics, Pennsylvania exported more hazardous waste in 1987 than any other state, 333,000 tons; Ohio imported more than any other, 486,000 tons . But if the difference between waste imported and waste exported by states is calculated, Pennsylvania was not the worst offender, nor was Ohio the most beleaguered victim.

California led net exporters, shipping out 196,000 more tons of hazardous waste than it imported; Pennsylvania exported a net of 111,000 tons. Indiana led net importers with 289,000 tons of waste, while Ohio imported a net of 211,000 tons.